The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Community Affairs Committee

BILL:	CS/CS/SB 2104
INTRODUCER:	Community Affairs Committee; Environmental Preservation and Conservation Committee; and Senator Constantine
SUBJECT:	Environmental Protection
DATE:	April 6, 2009 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Uchino	Kiger	EP	**Fav/CS**
2.	Molloy	Yeatman	CA	**Fav/CS**
3.			GA	
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

The CS/CS/SB 2104 (the bill) amends provisions of Florida Statutes that impact the Department of Environmental Protection relating to land management, surplus lands, membership of the Acquisition and Restoration Council, information submitted to the Land Management Uniform Accounting Council, the expenditure of Florida Forever funds for capital projects, sovereignty submerged lands, administrative hearings relating to the use of submerged lands, and federal delegation of air program pre-construction permitting activities. The bill excludes certain air pollution violations from department action, and revises and streamlines certain administrative penalties. Exceptions to the Florida Marketable Record Title Act (MRTA) are provided, and technical revisions are made.

The bill substantially amends the following sections of the Florida Statutes: 253.034, 253.111, 253.12, 259.035, 259.037, 259.105, 373.427, 403.0876, 403.121, 712.03, and 712.04.

II. Present Situation:

Section 1: SB 542 (ch. 2008-229, Laws of Florida) revised land management plan content and reporting requirements. The revisions intended that management planning, actual management and management reporting be detailed, effective and consistent across agencies. Multiple state agencies, local governments and other entities are responsible for preparing management plans for the state's 3.5 million acres of conservation lands. Pursuant to sections 253.034(5) and 259.032(10), F.S., these plans must be updated every 10 years. For management areas greater than 160 acres, the managing agency is required to form an advisory group composed of multiple entities and must conduct at least one public hearing. The statutory revisions required that all plans be revised to specifically identify long and short-term goals, quantitative data, and implementation schedules. The existing statute contains unclear language regarding goals, objectives and measures. There is confusion and disagreement among the state agencies on what standards to apply to adhere to these specific requirements, which must be uniform across all agencies so they can be compiled for legislative reporting purposes to show the overall land management needs and accomplishments.

Section 2: SB 542 created inconsistencies between statutory sections 253.111(2), F.S., which requires a county to determine with 40 days of receipt of the Board of Trustees of the Internal Improvement Trust Fund (Board) notice that it intends to surplus state lands, whether or not the county wishes to purchase lands being surplused, and sections 253.111 (3) and 253.034(6)(f)(1), F.S., which require that the property be offered to the county for 45 days.

Section 3: SB 542 increased the number of members of the Acquisition and Restoration Council (ARC) from nine to eleven, but failed to adjust the number of votes required to add or subtract projects from the list (currently five votes are required). Additionally, a long-standing glitch in which ARC members are permitted to serve two terms of four years each but are limited to six years of total service was not corrected.

Section 4: The July 1, 2008 effective date of SB 542 immediately instituted the new requirements for the Land Management Uniform Accounting Council, which requires more than 330 management plans amended and at least 268 advisory groups be formed to hold public hearings.

Section 5: The intent of revisions to s. 259.105, F.S., is to allow public access to conservation lands as soon as possible after purchase. However, all capital expenditures of the following programs' distributions must be identified during the time of acquisition:

- 35 percent to the Department of Environmental Protection (DEP) for the acquisition of lands;
- 1.35 percent to DEP to purchase inholdings and additions;
- 1.35 percent to the Division of Forestry at Department of Agriculture and Consumer Services (DACS) to purchase state forest inholdings and additions;
- 1.50 percent to the Fish and Wildlife Conservation Commission (FWC) to purchase inholdings and additions; and
- 1.50 percent to DEP for the Florida Greenway and Trails Program.

Section 6: Section 253.12 (9), F.S., does not apply to sovereignty lands that were filled by a governmental entity for a public purpose or pursuant to proprietary authorization from the Board. Such activities were not contemplated to fall under the legislation and the current language is unclear. This means that people may sue to claim title over sovereignty lands that were filled subject to the above purpose or authorization.

Section 7: Two different time clocks exist for the filing of administrative hearing petitions related to an Environmental Resource Permit (ERP), which leads to confusion for both the public and the permitting agencies.

- If the project is linked to activities occurring on sovereignty submerged lands, the petition must be filed within 14 days of receipt of notice that a permit has been granted or denied.
- If the project is not linked to activities on sovereignty submerged lands, the petition must be filed within 21 days of receipt of notice that a permit has been granted or denied.

Section 8: Title V major source air operation permits issued by the department under federally delegated or approved programs are exempt from the 90-day default provision of s. 403.0876, F.S., but other federally delegated programs are not.

Federal programs have specific public involvement procedures, such as a 30 day public comment period and a requirement to hold a public meeting if requested. These procedural requirements can cause permit processing to exceed the existing 90-day requirements of s. 403.0876, F.S., and result in the department's technical default under the 90-day requirements of s. 403.0876, F.S. If default permits result, federal program approval can be lost, requiring applicants to obtain separate state and federal permits, and a duplication of effort.

Examples of permits that would be covered are the major air construction permits that involve analysis under the Prevention of Significant Deterioration, the Non-Attainment New Source Review, or the case-by-case Maximum Achievable Control Technology requirements. Before issuance, these permits must include a 30-day public comment period and an opportunity for a public meeting, if such meeting is requested during the comment period.

Section 9: Section 403.121, F.S., currently allows the department and parties alleged to be in violation of Florida's environmental laws to resolve less significant environmental violations in an administrative proceeding, instead of in state court. Except for violations involving hazardous wastes, asbestos, or underground injection, the department must proceed administratively in all cases in which it seeks administrative penalties not in excess of $10,000 per assessment, as calculated under s. 403.121(3), (4), (5), (6), (7), and (8), F.S. Through this administrative enforcement process, an administrative law judge may impose up to $10,000 in administrative penalties in addition to requiring actions to correct the violation and bring the regulated entity back into compliance. Section 403.121, F.S., establishes a specific penalty schedule for violations that may be pursued administratively and allows alleged violators a hearing before the Division of Administrative Hearings to dispute the department's allegations, to mediate the dispute, or to opt out of the administrative process entirely. If an alleged violator opts out, the department must file in state court to pursue enforcement. The department bears the burden of proving by a preponderance of the evidence that the alleged violator caused the violation. In any administrative proceeding brought by the department, the prevailing party recovers all costs. In

cases that ultimately require a hearing by the Division of Administrative Hearing, the administrative law judge has final order authority. The alleged violator is entitled to an award of attorney's fees (up to $15,000) if the administrative law judge determines that the department's initiation of the enforcement action was not substantially justified.

Sections 10 and 11: Because of the vast holdings of each of the Water Management Districts (districts), as well as other state entities, it is a burden for the districts to expend significant resources in monitoring the status of title of all district land holdings, filing notices to protect district interests, and defending its interest in land holdings where they may be challenged based on the Florida Marketable Record Title Act (MRTA). The MRTA provides that one who holds title to land based on a root of title at least 30 years old, takes free and clear ownership of title and extinguishes all matters arising prior to the root of the title that are not referenced in the root of title. It is possible that someone can file a wild deed on a piece of government or district owned property and take ownership if the government agency or district does not file a notice to protect the agency or district's interest.

Section 712.03, F.S., identifies those interests in property that are not extinguished by marketable record title. Currently only sovereignty submerged lands and covenants recorded under the provisions of chapter 376 or chapter 403 expressly exempt governmental interests from extinguishment. Another provision of s. 712.03 F.S., exempts easements from extinguishment, when any parts of the easement are in use. The easement exemption implicates governmental entities who acquire conservation easements and land protection agreements. The "easement in use" exemption was originally intended to apply to visible use on the ground, by which an owner would have notice that someone else might be using the land. Conservation easements and land protection agreements, however, are not necessarily visible on the ground, so uncertainty surrounds whether the "easement in use" exception protects those interests from extinguishment by the MRTA.

III. Effect of Proposed Changes:

Section 1 amends paragraphs (a) and (c) of subsection (5), s. 253.034, F.S. The beginning date of July 1, 2009, applies to all newly developed or updated management plans and reporting requirements in order to provide department staff more time to accomplish necessary interagency planning and rulemaking to implement both short-term and long-term management goals in an orderly and consistent way across the participating agencies. It also provides technical changes.

Section 2 amends subsection (2), s. 253.111, F.S., to remove the timing inconsistency between s. 253.111(2), F.S., and ss. 253.111 (3) and 253.034(6)(f)(1), F.S. The 40-day limitation for a board of county commissioners to pass a resolution determining whether it wants to buy surplus lands offered by the Board is revised to 45 days. It also provides technical changes.

Section 3 amends subsections (1), (2), and (5), s. 259.035, F.S., to include language that would require an affirmative vote of 6 members of ARC to change a project boundary or add a project to the acquisition list, and to clarify that ARC members may serve two four-year terms. It also provides technical and conforming changes.

Section 4 amends paragraph (b) of subsection (3), s. 259.037, F.S., to add a beginning date of July 1, 2009 for the management plan and reporting requirements. It amends subsection (6) of s. 259.037, F.S., to add a beginning date of July 1, 2010 for each agency to submit its 5-year operational report requirements for management areas to which a new or updated plan was approved by the Board. The date allows department staff necessary to accomplish interagency planning and rulemaking to implement both short-term and long-term management goals in an orderly and consistent way across the participating agencies. It also provides technical changes.

Section 5 amends paragraphs (b), (e), (f), (g), and (h) of subsection (3), s. 259.105, F.S., to allow capital expenditures for rapid public access for projects which have been identified in the management prospectus, or during the development of the initial management plan, or update of the management plan. Such capital expenditures apply to:

- DEP for land acquisition.
- DEP for the purchase of inholdings and additions.
- The Division of Forestry at the DACS for the purchase of state forest inholdings and additions.
- The FWC to purchase inholdings and additions.
- The DEP to purchase greenways and trails.

It amends subsection (13), s. 259.105, F.S., to clarify that a majority vote of the ARC members is needed to place a proposed project on the Florida Forever acquisition list. It also provides technical changes.

Section 6 amends subsection (10), s. 253.12, F.S., to clarify that the provisions of subsection (9) do not operate to divest state ownership of sovereignty lands filled by a governmental entity prior to July 1, 1975, for a public purpose or pursuant to proprietary authorization from the Board. It also provides technical changes.

Section 7 amends paragraph (c) of subsection (2), s. 373.427, F.S., to provide that a petition for an administrative hearing must be filed within 21 days of the notice of consolidated intent to deny or grant concurrent permits requesting proprietary authorization to use sovereignty submerged lands for activities for which the Board has not delegated authority to take final action. It also provides technical changes.

Section 8 amends paragraph (c) of subsection (2), s. 403.0876, F.S., to provide that applications for an air construction permit for which a federally delegated or approved program requires a public participation period of 30 days or longer are not subject to the requirements of paragraph (a) which provides that a permit must be approved or denied within 90 days of application. It also provides technical changes.

Section 9 amends s. 403.121, F.S., to make technical and conforming changes, and to provide:

- Paragraph (b) of subsection (2) is amended to exclude major sources of air pollution as a violation for which the DEP must proceed administratively when seeking administrative penalties that do not exceed $10,000.
- Paragraph (f) of subsection (2) is amended to clarify that the respondent is the prevailing party when a final order is entered which does not require the respondent to perform any

corrective actions or award any damages or penalties to the DEP, and the order is not reversed on appeal or the time for judicial review is expired.

Subsection (3) is amended to provide for the following administrative penalties:

- Paragraph (a), relating to drinking water contamination violations:
  - $3,000 for failure to obtain a clearance letter from the department before putting a drinking water system into service if the system would not have been eligible for clearance; and $1,500 for all other failures to obtain a clearance letter;
  - $2,000 for failure to complete required public notification of violations, exceedances, or failures that may pose an acute risk to human health, plus $2,000 if the violation occurs at a community water system; and $1,000 for all other failures to complete required public notification relating to maximum containment violations, plus another $1,000 if the violation occurs at a community water system.
  - $1,000 for failure to submit a consumer confidence report to the department; and
  - $1,000 for failure to provide or meet licensed operator or staffing requirements at a drinking water facility, plus $1,000 if the violation occurs at a community water system.

- Paragraph (b), relating to wastewater violations:
  - $5,000 for failure to obtain a required wastewater permit before construction or modification, other than a permit required for surface water discharge.
  - $4,000 for failure to obtain a permit to construct a domestic wastewater collection and transmission system.
  - $1,000 for failure to renew a required wastewater permit, other than a permit required for surface water discharge.
  - $2,000 for failure to properly notify the department of an unauthorized spill, discharge, or abnormal event that may impact public health or the environment; and $2,000 for failure to provide or meet requirements for licensed operators or staffing at a wastewater facility.

- Paragraph (c), relating to dredge and fill, or stormwater violations, to provide a penalty for a dredging violation, a fill violation, or a stormwater violation:
  - In addition to other statutorily applied penalties, an additional penalty of $3,000 if the person or persons responsible previously applied for or obtained authorization from the DEP to dredge or fill within wetlands or surface waters.
  - $10,000 for dredge, fill or stormwater management system violations occurring in a conservation easement.

- Paragraph (d), relating to mangrove trimming and alteration violations:
  - $5,000 per violation for any person who violates ss. 403.9321-403.9333, F.S. The preparation or signing of a permit application by a person licensed under chapter 471 to practice as a professional engineer does not constitute a violation.
  - For second and subsequent violations, an additional $100 penalty for each mangrove illegally trimmed and a $250 penalty for each mangrove illegally altered, not to exceed $10,000.

- For second and subsequent violations by a professional mangrove trimmer, an addition $250 penalty for each mangrove illegally trimmed or altered, not to exceed $10,000.

- Paragraph (e), relating to solid waste violations:
  - A penalty of $2,000 for the unpermitted disposal or unauthorized disposal or storage of solid waste, plus a penalty of $1,000 for unpermitted or unauthorized solid waste if the waste is Class I or Class III, including yard waste (previously excluded.)
  - $5,000 for failure to timely implement evaluation monitoring or corrective actions in response to adverse impacts to water quality at permitted facilities.
  - $3,000 for failure to have a trained operator on duty as required by DEP rule; for failure to apply and maintain adequate initial, intermediate, or final cover; failure to control or correction erosion resulting in exposed waste; failure to implement a gas management system as required by DEP rule, or processing or disposing of unauthorized waste.
  - $2,000 for failure to compact and slope waste, or maintain a small working face as required by DEP rule.
  - $1,000 for failure to timely submit annul updates required for financial assurance.

- Paragraph (f), relating to air emission violations:
  - Removed the additional $1,000 administrative penalty for an air emission if the emission results in an air quality violation.

- Paragraph (g), relating to storage tank system and petroleum contamination violations:
  - $5,000 for failure to complete site assessment reports.
  - $3,000 for failure to timely assess or remediate petroleum contamination as required by department rule.
  - $1,000 for failure to repair a storage tank system.

- Paragraph (h), relating to waste cleanup violations:
  - $5,000 for failure to submit a complete site assessment report.
  - $5,000 for failure to provide notice of contamination beyond property boundaries.
  - $5,000 for failure to complete an offsite well survey.
  - $5,000 for the use or injection of substances or materials to surface water or groundwater for remediation purposes without prior DEP approval.
  - $5,000 for operation of a remedial treatment system without prior DEP approval.
  - $3,000 for failure to timely assess or remediate contamination as required by department rule.

- Subsection (4) provides that in an administrative proceeding, the DEP may assess penalties in addition to those provided in subsection (3), or for violations not listed in subsection (3).
  - $4,000 penalty for failure to properly operate a required pollution control, collection, treatment or disposal system.
  - $4,000 for failure to use appropriate best-management practices or erosion and sediment controls.

- $3,000 for failure to obtain a required license or permit if the facility is constructed, modified, or operated in compliance with applicable requirements.
- $5,000 for failure to obtain a required license or permit if the facility is constructed, modified, or operated out of compliance with applicable requirements.
- $1,000 for failure to prepare, submit, maintain, or use required reports or other documentation, or for failure to comply with any other DEP regulatory statute or rule requirement, but excluding penalties applied to public water systems serving a population of more than 10,000.
- The DEP may not seek more than $5,000 against any one violator unless the violator has a history of noncompliance or received economic benefit from the violation.

Sections 10 and 11 create subsection (9) of s. 712.03, F.S., and amend s. 712.04, F.S., respectively. The proposed amendments would create an exemption to the applicability of MARTA for any right, title, or interest held by the Board of Trustees of the Internal Improvement Trust Fund or by any local government, water management district, or other agency of the state. These amendments also resolve the confusion over whether conservation easements and land protection agreements were "easements in use" and prevent rights and interests acquired with public funds for public benefit from being extinguished. Section 11 provides for technical changes.

Section 12 provides for an effective date of July 1, 2009.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

It is indeterminate how much of an impact there will be to the private sector from this CS. There may be some additional costs from exercising a landowner's riparian rights given the exemption of sovereignty lands that were filled for a public purpose or proprietary authorization from the Board of Trustees of the Internal Improvement Trust Fund, but

those costs, if any, are indeterminate. There may be slight cost savings to the private sector in synchronizing the linked and unlinked clocks to 21 days because of clarity and ease of filing a petition for an administrative hearing for an Environmental Resource Permit for activities that occur on sovereignty submerged lands; however, any costs savings is unknown.

Fines assessed against persons for some existing minor environmental violations subject to department administrative penalties have been increased. It is unknown how much the streamlining of the additional administrative penalties as provided in section 9 of this CS may save the private sector in both time and litigation expenses. It is possible the savings will be significant as the ELRA process takes an average of four months, while processing through the state courts takes an average of two years. Violators also do not need to hire a lawyer to process their alleged violations through the ELRA, and, if unsatisfied with the administrative process, their right to go to court is automatically preserved. Further, if the alleged violator prevails in the ELRA hearing before an administrative law judge, he or she may be entitled to costs and up to $15,000 in attorney's fees.

C. Government Sector Impact:

The Revenue Estimating Conference has been asked to schedule this bill for hearing at an impact conference.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Community Affairs on April 6, 2009:
The CS/CS/SB 2104 provides for an affirmative vote of 6 members of the Acquisition and Restoration Council to complete certain council responsibilities; reduces penalties relating to drinking water violations; and revises penalties for waste cleanup violations.

CS by Environmental Preservation and Conservation on March 17, 2009:
The CS changes "effective" dates to "beginning" dates in paragraphs (a) and (c) of subsection (5) of s. 253.034, F.S. The CS also clarifies that requirements of these paragraphs apply only to newly developed or updated management plans.

The CS amends subsection (6) of s. 259.037, F.S. to change the requirement that agencies submit operational reports once every 5 years for management plans that are new or updated, instead of biennially.

The CS amends paragraphs (b), (e), (f), (g), and (h) of subsection (3) of s. 259.105, F.S. to remove all time constraints for capital expenditures necessary to provide public access.

The CS amends subparagraph 1 of paragraph (d) of subsection (3) of s. 403.121, F.S. to clarify that the preparation or signing of a permit by a professional engineer does not constitute a violation of ss. 403.9321-403.9333, F.S.

The CS provides for technical and conforming changes.

B. Amendments:

None.